

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE CITY OF MINNEAPOLIS

In the Matter of All Licenses Held by
Samir Hamaden Abumayyaleh, CUP
Foods, For Premises at 3579 Chicago
Avenue South, Minneapolis, Minnesota

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Phyllis Reha, acting as a hearing officer for the Minneapolis City Council, commencing at 9:30 a.m. on March 28, 2000, at the Office of Administrative Hearings. The hearing was continued for further testimony on March 30, March 31, May 5, and May 15, 2000. The hearing was held pursuant to a Notice of Hearing dated November 19, 1999, an Amended Notice of Hearing dated February 25, 2000, and a Second Amended Notice of Hearing dated March 27, 2000. The parties filed written submissions in lieu of closing arguments and the record closed August 2, 2000, with the filing of response letters.

Scott Reeves and Tami Schroeder, Assistant Minneapolis City Attorneys, 333 South 7th Street, Suite 300, Minneapolis, Minnesota 55402-2453, appeared on behalf of the Division of Licenses and Consumer Services of the City of Minneapolis (the City). Ronald Meshbesh, Attorney at Law, Meshbesh & Spence, 1616 Park Avenue, Minneapolis, Minnesota 55404, appeared on behalf of Samir Abumayyaleh, the Licensee (Licensee).

NOTICE

This Report contains a recommendation and not a final decision. The final decision will be made by the Minneapolis City Council, which may affirm, reject, or modify the Findings and Conclusions contained herein. The Council will consider the evidence in this case and these recommended Findings of Fact and Conclusions, but will not consider any factual testimony not previously submitted to and considered by the Administrative Law Judge. The Licensee will have an opportunity to present oral or written arguments alleging error on the part of the Administrative Law Judge in the application of the law or interpretation of the facts and may present argument related to the recommendation. The Council's decision as to what, if any, adverse action shall be taken will be by resolution under Chapter 4, Section 17 of the Minneapolis City Charter. To ascertain when the Council will consider this matter, the parties should contact the City Clerk, Council Information Division, 350 South Fifth Street, Room 304, Minneapolis Minnesota 55415-1382, telephone number (612) 673-3136.

STATEMENT OF ISSUE

The issue in this matter is whether the loitering and sales of controlled substances on and near the premises of the Licensee's business constitutes good cause for adverse action against CUP Foods existing business licenses and denial of its license renewal applications.

Based upon all of the files, records and proceedings herein, the Administrative Law Judge (ALJ) makes the following:

FINDINGS OF FACT

1. CUP Foods is a small grocery store located at 3759 Chicago Avenue South, on the northeast corner of Chicago and 38th Street in Minneapolis. CUP Foods has been continually licensed by the City of Minneapolis since 1989. CUP Foods sells mostly packaged food, some perishables, tobacco products, soft drinks and beer, and general merchandise. In addition, the store sells cellular phones, pagers, and phone cards, and provides a check cashing service. Several years after it opened, CUP Foods added a deli, which offers hot and cold food for take out or consumption on the premises.

2. CUP Foods holds licenses issued by the City of Minneapolis for the sale of grocery items, tobacco products, off-sale beer and for food manufacturing. All of these licenses expire on March 31st of each year, subject to renewal effective April 1st of each year. Licenses were first issued to CUP Foods in 1989 and were last renewed effective April 1, 1998, for the period April 1, 1998 through March 31, 1999. Applications for renewal have been pending since that time. (Schmit-Gonzales at 38-40).

3. Samir Abumayyaleh (the Licensee) is the president and 100 percent shareholder of CUP Foods, Inc. The store opened for business on September 1, 1989. (Ex. 1).

4. The Licensee's brother Nabil ("Billy") helps manage the store. Billy has a prior felony conviction for Auto Theft. (Ex. 23).

5. From the beginning of its operation, CUP Foods has had problems with loitering and drug activity on and near the premises. CUP Foods has also experienced problems with shoplifting, vandalism, theft and forgery. (Licensee at 758-759).

6. Super America, which is a gas station and convenience store located directly across the street from CUP Foods, has also experienced problems with loitering and drug activity on its premises. (Appledorn at 323, 332; Skrivseth at 441-445; Wadena at 645, 661).

7. After CUP Foods was first licensed, the City received complaints about loitering in front of the store and the store remaining open after lawful hours of operation.^[1] The City's Licensing and Consumer Services Division gave the Licensee verbal and written warnings to comply with the lawful hours of operation at CUP Foods. Despite these warnings, CUP Foods remained opened past its lawful hour of operation on at least three occasions in 1992. (Schmit-Gonzales at 44-47; Ex. 2).

8. On February 8, 1993, the City sent the Licensee a notice to appear at a Technical Advisory Committee (TAC) meeting of the Licenses and Consumer Services Committee to consider disciplinary action against CUP Foods' licenses due to non-compliance with the Minneapolis ordinance governing lawful hours of operation. The

meeting took place on February 22, 1993 at City Hall. As a result of the TAC meeting, the Licensee stipulated to Findings of Fact, Conclusions and Recommendations dated March 16, 1993. Pursuant to this document, the Licensee agreed to comply with several conditions recommended by the committee including, removing public pay telephones from the outside of his building, employing experienced evening managers to control "hangout activity", reporting unlawful drug peddling to the Police Department, hiring an off-duty police officer during the month of March 1993 for evening patrol of the premises, and closing the store at its lawful hour of operation. In addition, the Licensee agreed to post "No Loitering" signs near the front of CUP Foods. (Schmit-Gonzales at 45-47; Skrivseth at 424-426; Ex. 2).

9. The Licensee complied with the TAC agreement by removing the two public pay phones located outside the store, closing the store in accordance with the lawful hours of operation, posting "No loitering" signs in the store, and hiring off-duty police officers to patrol the store's premises. (Schmit-Gonzalez at 49).

10. After employing off-duty police officers to provide security services for approximately eight months in 1993, the Licensee discontinued the practice because of the high cost for such services. (Licensee at 765-767).

11. In order to combat loitering in and near the store, the Licensee implemented a policy whereby he or his employees ask loiterers to leave and warn them that if they do not leave, the police will be called. If the loiterers do not leave, the Licensee or his employees call 911 for police assistance. In addition, the Licensee uses a loudspeaker system to tell people not to loiter in front of the store. (Roesler at 508-511; Bryan at Licensee at 901-902, 959-960; Exs. 26, 27a, 27b, 220).

12. In 1996, a neighborhood task force was formed to attempt to improve safety and reduce loitering and drug dealing activity in the vicinity of 38th Street and Chicago Avenue. Calling itself the Chicago/38th Street task force, the group meets monthly and is made up of neighborhood residents. In 1998, the Chicago/38th Street task force formed a special committee devoted solely to problems at CUP Foods. In its four years of existence, the Licensee attended approximately five task force meetings. The majority of the meetings that the Licensee attended occurred after November 1998. At these task force meetings, neighborhood residents complained about the loitering and drug activity in and near CUP Foods. The neighborhood residents also requested that the Licensee remove signs and other obstructions from the store's windows to discourage loitering and criminal activity inside the store. In response, the Licensee removed some signage from one of his store's windows. (Hill at 136-140, 159; Roesler at 516; Skelton at 573-578; Licensee at 770-772) .

13. In 1997 the Metropolitan Transit Commission (MTC) relocated a bus stop in front of CUP Foods. Because the new stop included a shelter and bench, loitering on the corner increased. (Hill at 151; Skrivseth at 437-438; Roesler at 518-519, 530-531, 564).

14. On June 16, 1998, Community Crime Prevention Specialist Karen Skrivseth and Officer Sherry Appledorn of the Minneapolis Police Department's SAFE^[2] Unit visited the Licensee at his store to discuss the continued loitering and drug peddling problems in and around the store's premises. During the meeting with Ms. Skrivseth and Officer Appledorn, the Licensee signed a "no trespassing" affidavit and agreed to post two new "no trespassing" signs at the store. Both Ms. Skrivseth and Officer Appledorn gave the Licensee their cards and instructed him to call 911 or to contact them if he had any problems with loitering or other criminal activity in and around his store. (Appledorn at 108-111; Skrivseth at 427-428, 447-449; Ex. 9 at 226).

15. Since 1996, numerous calls to 911 were placed from the CUP Foods store.^[3] A large percentage of these calls were related to drug dealing and loitering. The Licensee has personally called 911 on many occasions to report loitering at his store. In addition, the Licensee has spoken directly to individual police officers and requested their assistance with loitering at his store. (Hill at 158; Appledorn at 252-253, 343, 358-360; Roesler at 491-508; Licensee at 761; Nelson at 839; Kenow at 853-860; Exs. 26, 27a, 27b, 220).

16. On July 13, 1998, Sean James was shot immediately after leaving CUP Foods. James was listed as a gang member in Minneapolis Police Department Gang Unit records. The police investigator determined the shooting to be most likely a gang-related retaliation by rival gang members. (Wagenpleil at 380-386; Ex. 14).

17. On September 23, 1998, Bobby Woods was shot after leaving CUP Foods. Woods was listed as a gang member in Minneapolis Police Department Gang Unit records. Woods told a police investigator that he believed he was shot by rival gang members for wearing the wrong colors. (Wagenpleil at 386-389; Ex. 15).

18. In response to continued complaints regarding drug dealing and loitering in and around CUP Foods, Officer Appledorn conducted a surveillance of the store in October of 1998. On two or three occasions, Officer Appledorn watched the store and observed persons hanging around by the entryway for extended periods of time. Officer Appledorn saw these loitering individuals periodically enter and exit CUP Foods without evidence of having purchased anything in the store. Officer Appledorn also observed cars pull up to CUP Foods and their occupants engage in hand-to-hand exchanges with individuals loitering by the store. After such transactions, Officer Appledorn observed the same individuals resume their loitering by the store. (Appledorn at 112-120).

19. Beginning in October of 1998, confidential informants made several controlled purchases of crack cocaine, or apparent crack cocaine, in CUP Foods. Five controlled drug buys were made prior to November 18, 1998, by four different paid informants. Five other controlled drug buys were made after November 18, 1998. (Appledorn at 181-184).

20. Between October 23 and 24, 1998, a confidential informant purchased crack cocaine inside CUP Foods. The informant entered CUP Foods, returned and handed Officer Appledorn a plastic wrapper containing a substance that appeared to be

crack cocaine. A subsequent test by the city chemist found the substance to be positive for cocaine base. (Ex. 3).

21. Between October 24 and 26, 1998, a confidential informant made a second controlled buy of apparent crack cocaine in the parking area owned by CUP Foods immediately to the rear of the premises. The informant initially met and talked with one person outside CUP Foods and then spoke to another person inside the store. After the sale, the informant returned to Officer Appledorn and gave her a plastic wrapper containing a substance that appeared to be crack cocaine. The city chemist tested the substance and found it to be negative for cocaine base. (Appledorn at 188-191; Ex. 4)

22. Between October 25 and 26, 1998, a confidential informant purchased crack cocaine inside CUP Foods. The informant entered CUP Foods, returned to Officer Appledorn and gave her a plastic baggie containing a substance that appeared to be crack cocaine. The substance was later tested by the city chemist and was found to be positive for cocaine base. (Ex. 5).

23. On October 30, 1998, Sammy Johnson was shot shortly after leaving CUP Foods. Johnson admitted to a police investigator that he was dealing drugs by the garbage cans behind CUP Foods, and had just finished a sale when he was shot. Police investigators eventually concluded that Johnson's gunshot injury was accidentally self-inflicted. (Wagenpleil at 389-396; Ex. 16).

24. On November 7, 1998, a confidential informant purchased cocaine inside CUP Foods. The informant entered CUP Foods, returned and gave Officer Appledorn a plastic baggie containing a substance that appeared to be crack cocaine. The substance was tested by the city chemist and was found to be positive for cocaine base. (Appledorn at 192-194; Ex. 6).

25. Between November 11 and 12, 1998, a confidential informant purchased apparent crack cocaine inside CUP Foods. The informant entered CUP Foods, returned, and gave Officer Appledorn a plastic baggy containing a substance that appeared to be crack cocaine. The substance was later tested by the city chemist and found to be negative for cocaine base. (Appledorn at 194-196; Ex. 7).

26. On November 12, 1998, the Hennepin County District Court issued a search warrant for CUP Foods. The search warrant was executed on November 18, 1998 at about 9:00 a.m. During the search, Minneapolis police officers seized ten stolen cell phones, a stolen bicycle, a large quantity of ephedrine, glass tubing commonly used to smoke crack cocaine, and numerous scales. Officers also found numerous bullet holes and spent shell casings in the basement of CUP Foods. (Ex. 8 at 509-510).

27. Because handguns were found behind the store counter during the search of CUP Foods, Billy was arrested and eventually charged by the Hennepin County

Attorney's Office with being a felon in possession of a firearm. (Ex. 23). The charge against Billy was ultimately dismissed without prejudice by motion of the prosecution.

28. On November 24, 1998, a confidential informant purchased crack cocaine immediately outside the front entrance of CUP Foods. The seller came out of CUP Foods, approached the informant and made a hand-to-hand exchange. After the exchange, the seller went back inside CUP Foods. The informant returned to Officer Appledorn and gave her loose chunks of a substance resembling crack cocaine. A subsequent test by the city chemist found the substance to be positive for cocaine base. (Appledorn at 230-235; Ex. 10).

29. On January 20, 1999, Officer David Rodriguez entered CUP Foods undercover posing as a potential drug purchaser. Officer Rodriguez was accompanied by a confidential informant. Officer Rodriguez and the informant went to the deli area of the store. The informant ordered and purchased food from the counter and both the informant and Officer Rodriguez sat at a table in the deli area. While seated at a deli table, the informant introduced Officer Rodriguez to a narcotics seller who sold Officer Rodriguez a rock of crack cocaine. This sale took place while the informant and Officer Rodriguez remained seated at a deli table a short distance from the deli counter. At the time of the sale, the Licensee's brother Billy was working behind the counter taking care of customers. The drugs purchased by Officer Rodriguez were later tested by the city chemist and found to be positive for cocaine base. (Rodriguez at 53-62, 89; Exs. 11, 28).

30. On February 10, 1999, Officer Rodriguez went to CUP Foods undercover posing as a seller of stolen cellular phones. Officer Rodriguez attempted to sell the stolen phones to the Licensee's brother Billy, who was working at the store. Billy refused to buy the stolen phones and referred Officer Rodriguez to another merchant nearby. (Rodriguez at 62-68; Ex. 12).

31. On June 18, 1999, a confidential informant purchased marijuana inside CUP Foods. The informant entered CUP Foods and returned a short time later with a plastic baggie containing suspected marijuana. The substance was field tested by Officer Appledorn and was found to be positive for marijuana. (Appledorn at 235-240; Ex. 29).

32. On June 23, 1999, a confidential informant purchased crack cocaine inside CUP Foods. The informant entered CUP Foods, returned and gave Officer Appledorn a plastic baggie containing suspected crack cocaine. The substance field-tested positive for cocaine. (Appledorn at 240-241; Ex. 30).

33. On August 7, 1999, a confidential informant purchased crack cocaine inside CUP Foods. The informant entered CUP Foods, returned and gave Officer Appledorn a bindle made from a lottery ticket containing the suspected crack cocaine. The substance field-tested positive for cocaine. (Appledorn at 241-242; Ex. 31).

34. In October of 1999, Civilian Crime Specialist Jan Roesler met with the Licensee to make recommendations to improve security and reduce crime in and around CUP Foods. Among other things, Ms. Roesler recommended that the Licensee decrease the height of his shelves, remove advertisements and other signage from the store windows to increase visibility, and reduce the deli seating to discourage loitering in the store. Ms. Roesler explained that the inability to see into a store encourages loitering and criminal activity. (Roesler at 472-478).

35. The Licensee did remove some signage from one store window and he reduced the seating in the store's deli area by two seats. The majority of the store's windows remain largely obstructed by advertising and other signage. (Roesler at 1000-1004).

36. On November 9, 1999, Officer Gary Nelson responded to a call regarding a person with a gun in the vicinity of 38th Street and Chicago Avenue South. When Officer Nelson arrived at the scene, he observed two males matching the description of the suspect. The two persons were standing immediately outside the main entrance to CUP Foods. When the suspects saw Officer Nelson in his marked squad car, they entered CUP Foods. Officer Nelson waited for backup before entering CUP Foods. When Officer Nelson entered CUP Foods, he found one of the individuals standing in the aisle of the store. On a store shelf, about 5-10 feet away from this individual, Officer Nelson saw a plastic bag containing several individually wrapped packages of a substance appearing to be crack cocaine. Officer Nelson estimated the street value of the crack cocaine to be approximately \$500. Officer Nelson found the other individual at the pay phones in the store. Officer Nelson identified this individual as a known gang member. (Nelson at 813-823; Ex. 13).

37. Several residents of the neighborhoods abutting 38th Street and Chicago Avenue have personally observed on a frequent and regular basis groups of persons loitering in the entryway of CUP Foods. These neighborhood residents have also observed hand-to-hand transactions between occupants in cars and individuals loitering by the store. (Hill at 141-143, Skelton at 585-588; Harris at 604-609; Wadena at 624, 629-634).

38. Several residents of the surrounding neighborhoods believe CUP Foods provides a needed service to their community (e.g., groceries, convenience, reasonable prices) and these residents do not want to see this store closed. These neighborhood residents have witnessed the Licensee treat customers with respect, eject unwanted persons from the store, and ask loiterers to leave the premises on a regular basis. (Childress at 690-692,697; M. Walker at 701-703; Theisen at 710-711; Raske at 729-732, 742; Watts at 876; Bryan at 882).

39. The Licensee has recently hired off-duty police officers to patrol the store's premises and provide security services on Friday and Saturday evenings. (Kenow at 859-861).

40. On November 19, 1999, the Minneapolis City Attorney's Office issued a Notice of Hearing to the Licensee. The notice listed five controlled buys of narcotics at CUP Foods between October and November 18, 1998, evidence from a search warrant executed on November 18, 1998, four controlled buys of narcotics at CUP Foods after November 24, 1998, three shootings outside of CUP Foods, and the fact that the Licensee's brother was charged with being a felon in possession of a firearm as evidence to be presented at the hearing that may lead to adverse action against all licenses held at CUP Foods.

41. On February 25, 2000, the Minneapolis City Attorney's Office issued an Amended Notice of Hearing to the Licensee. The amended notice changed the date and time of the hearing. The amended notice also did not list a November 25, 1998 controlled buy of crack cocaine as part of the evidence to be presented at the hearing. "Adverse action" was described in the Notice of Complaint as "revocation, suspension, fines, and other penalties or conditions."

42. On March 27, 2000, one day before the hearing commenced in this matter, the Minneapolis City Attorney's Office issued a Second Amended Notice of Hearing to the Licensee. This amended notice added three controlled buys of crack cocaine to the list of evidence to be presented at the hearing. The controlled buys were alleged to have occurred on November 24, 1998, June 18, 1999, and August 7, 1999.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Minneapolis City Council have authority to consider the charges against the Licensee and the adverse action, if any, that should be imposed by the City pursuant to Section 188.350 of the Minneapolis Code of Ordinances, Chapter 4, Section 16 of the Minneapolis City Charter, and Minnesota Statutes § 14.55 (1999).

2. The City has complied with all relevant substantive and procedural legal requirements.

3. The Licensee received adequate and timely notice of the hearing and of the charges against his business licenses.

4. The Minneapolis Code of Ordinances, Title 10, Article II, Chapter 188.350, provides that: "Any license granted under this chapter may be revoked by the mayor or the city council as in the city charter provided."

5. The Minneapolis City Charter, Chapter 4, Section 16 states:

Section 16. Licenses May Be Revoked. Any license issued by authority of the City Council may be revoked by the City Council at any time upon proper notice and hearing for good cause; and upon conviction before any court of any person holding such a license for a violation of the provisions of any law, ordinance or regulation relating to the exercise of any right granted by such license, the city council may revoke such license in

addition to the penalties provided by law or by ordinance for any such violation.

6. The City has the burden of proof to establish, by a preponderance of the evidence that good cause exists for taking adverse action against the business licenses held by the Licensee.^[4]

7. The City has demonstrated that good cause exists for taking adverse action against the business licenses held by the Licensee.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Minneapolis City Council take adverse action against the licenses held by CUP Foods.

Dated this ____ day of September, 2000

PHYLLIS A. REHA
Administrative Law Judge

Reported: Transcribed (5 volumes).

MEMORANDUM

The City of Minneapolis has brought disciplinary action against the existing business licenses of CUP Foods based on loitering and the sale of controlled substances on and near the store's premises. The City maintains that good cause exists to take adverse action against the licenses held by CUP Foods because the Licensee has permitted, encouraged, or failed to control drug dealing and loitering in the store and immediately outside of the store. The Minneapolis Police Department began a surveillance and an undercover investigation of CUP Foods in 1998 in response to complaints from neighborhood residents regarding loitering and drug dealing in and around the store. On 10 separate occasions, actual or apparent controlled substances were purchased at CUP Foods. Five of these controlled buys occurred before a search warrant was executed on November 18, 1998. And the remaining five controlled buys occurred after this date. In all but one of the controlled buys, the substance purchased was either actual or apparent crack cocaine.

The hearing in this matter took place over five days in March and May of 2000. At the close of the hearing, the Licensee moved to strike all testimony regarding the controlled buys by paid informants on the grounds that the identity of the informants were not disclosed to the Licensee and, as a result, the Licensee was denied the opportunity to depose or cross-examine the informants as to the facts of each controlled

buy. The Administrative Law Judge directed the parties to address this issue in their post-hearing briefs.

In considering the Licensee's motion, the ALJ first notes that this matter was originally scheduled for hearing on December 8, 1999. The hearing date was rescheduled to March 28, 2000 to accommodate the Licensee and to allow for discovery.^[6] Despite the fact that the initial Notice of Hearing dated November 19, 1999, put the Licensee on notice that informants had been used in the City's investigation, the Licensee never filed a motion to compel discovery of the informants' identities prior to the hearing. The Licensee did make an objection on hearsay grounds when Officer Appledorn began to testify at the hearing about the controlled buys. The Licensee argued that unless the informants were produced as witnesses, the officer should not be allowed to relate what they told her. (T. at 127). The ALJ sustained the hearsay objection with respect to testimony concerning what the informants told Officer Appledorn. And the ALJ limited Officer Appledorn's testimony regarding the controlled buys to what she told the informants, what she personally observed, and what substance/product she received from the informants as a result of the controlled buy. (T. 131-132). Officer Appledorn proceeded to testify within the parameters of this ruling. No out of court statements made by informants were elicited by the City and all informant statements contained in the related police reports were redacted prior to being admitted into evidence.

The Administrative Law Judge finds the Licensee's motion to strike all testimony regarding the controlled buys to be untimely and without merit. The Licensee had ample opportunity to attempt to compel discovery of the informants' identities, but waited until the close of the hearing to move to exclude all testimony. Had this motion been brought prior to the hearing, the City would have had an opportunity to respond and/or cure the situation if necessary. Despite this, the ALJ's ruling on the Licensee's hearsay objection excluded all evidence regarding what the informants allegedly told Officer Appledorn. This ruling appropriately addressed the Licensee's concerns about unreliable hearsay and the right to confront and cross-examine witnesses. Moreover, it is only in rare cases where a *criminal* defendant's interest in learning the identity of a police informant outweighs the state's privilege not to disclose the identity.^[6] The purpose of the informant privilege is to protect the identity of government informers so as to shield them from retribution and to preserve their usefulness for future operations.^[7] The Licensee has failed to establish that his need for obtaining the informants' identities outweighs the City's privilege not to disclose their identity. This is particularly true when the nature of the proceeding is an administrative licensing action and not a criminal matter.

Finally, administrative contested case hearings are not governed by the strict rules of evidence that apply to trial court cases. Rather, the Administrative Procedure Act (APA) provides that agencies "may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonable prudent persons in the conduct of their affairs."^[8] Likewise, the rules of the Office of Administrative Hearings provide that admissible evidence may include "reliable" hearsay.^[9] Given this relaxed standard of admissibility, and the ALJ's earlier ruling excluding all statements

made by the informants, the Licensee's motion to strike all testimony concerning the controlled buys is denied.

The Licensee next challenges the sufficiency of the notice provided by the City in this matter. Specifically, the Licensee argues that the City failed to provide adequate notice of the five controlled drug buys that allegedly occurred before the execution of the search warrant at CUP Foods on November 18, 1998. According to the Licensee, evidence regarding the alleged controlled buys that took place on or near CUP Foods on October 23, 1998, October 24, 1998, October 25, 1998, November 7, 1998, and November 11, 1998 should not be considered by the ALJ because these buys were not specifically listed in any of the notices of hearing provided by the City.

In each of the City's notices of hearing, the City individually listed the controlled buys that allegedly occurred after execution of the search warrant on November 18, 1998. With respect to the five controlled buys that occurred before November 18, 1998, the City simply wrote in an initial paragraph describing the evidence to be presented at the hearing:

"Between the dates of January 1998 until the present, officers of the Minneapolis Police Department (MPD) have made several purchases of crack cocaine at CUP Foods, located at 3759 Chicago Avenue South. Following five controlled buys of illegal drugs, on or about November 19, 1998, Minneapolis police officers executed a search warrant at CUP Foods, located at 3759 Chicago Avenue South."

The Licensee states in his reply letter dated July 28, 2000, that he "does not claim that he had no knowledge of the alleged incidents, but rather that they are not a proper basis for adverse action because they were not listed in the Second Amended Notice of Hearing." And the Licensee claims that: "[w]hile the additional alleged controlled drug purchases may have been relevant at the hearing for purposes of providing foundation for the search warrant evidence, the lack of formal notice precludes them from being a basis for adverse licensing action."^[10]

The APA specifically requires that reasonable notice be given to all parties before a contested case hearing.^[11] In addition to notice requirements set out in statute and rule, constitutional due process requires that a party be afforded notice of the claims to be litigated, as well as an opportunity to present evidence on the issues to be determined.^[12] An OAH rule specifically provides that an agency may amend its notice of and order for hearing at any time before the close of the hearing, provided that the parties have a reasonable time to prepare to meet any new issues or allegations that are raised.^[13] The notice of hearing must spell out the specific nature of the charges of misconduct against the respondent.^[14] The charges need not be drawn with the specificity of a criminal complaint, however.^[15] The details of specific incidents or events need not be described, but sufficient facts must be presented to apprise the respondent of the grounds on which the charges are based.^[16] The focus of the judicial inquiry about adequate notice is whether the failure of the agency to disclose facts underlying its case prohibits the respondent from being able to effectively respond.^[17]

The ALJ concludes that the notice of hearing provided by the City was sufficient to apprise the Licensee of the grounds on which this action is based and to afford him

an opportunity to respond. In particular, the City's decision not to individually list the first five controlled drug buys in its notices of hearing did not prohibit the Licensee from being able to effectively respond. Both the initial notice of hearing and the Second Amended Notice of Hearing state that five controlled buys of illegal drugs occurred at CUP Foods before execution of the search warrant on November 19, 1998, and that evidence of these buys will be part of the evidence presented at the hearing. Unlike the controlled buys occurring after November 19, 1998, these controlled buys were not individually listed in the notices. The fact that these five alleged controlled buys were not individually listed does not render the notice insufficient. Stating that five controlled buys of illegal drugs occurred before November 19, 1998, is sufficient to put the Licensee on notice that these controlled buys (in addition to the other controlled buys) are potential grounds for adverse action. There is no requirement that the City specifically list each alleged controlled buy.

Moreover, the Licensee concedes in his July 28, 2000 reply letter that he had knowledge of the alleged controlled buys at issue. The Licensee also responded to Officer Appledorn's testimony regarding these alleged controlled buys during the hearing. In addition, as noted by the City, the Licensee was served with discovery on March 8, 2000 that included copies of all police reports relating to CUP Foods between 1998 and 2000. This discovery contained copies of police reports on all of the controlled buys undertaken at the store, including the five that took place before November 19, 1998 and the ones added in the Second Amended Notice. Moreover, Officer Appledorn was available for cross-examination regarding all of the controlled buys. And, given the 35 day adjournment between the March 31st and May 5th hearing dates, the Licensee had ample time to prepare and effectively respond to all the evidence presented.

Furthermore, even if grouping the first five controlled buys into one paragraph did somehow render the notice insufficient, the ALJ finds that the Licensee consented to try the issue of these alleged buys by responding to the testimony of Officer Appledorn regarding these controlled buys and not objecting at the time on the grounds of lack of notice. The Licensee's failure to object on the grounds of lack of notice and his concession that he had knowledge of the alleged incidents before the hearing defeat any due process challenge he may have to the sufficiency of the notice. Pursuant to Minnesota Rules of Civil Procedure 15.02: "When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings."^[18] For all of these reasons, the Administrative Law Judge finds the Licensee's due process claim of insufficient notice to be without merit.

The Administrative Law Judge now turns to the merits of this matter, and specifically to the issue of whether good cause exists to take adverse action against CUP Foods' business licenses. Adverse action against the licenses is being sought by the City based on the sale of controlled substances and loitering on and near the store's premises, the recovery of stolen cellular phones during the police search of the store's premises, the three shootings occurring outside CUP Foods in 1998, and the employment of a convicted felon ("Billy") to manage the store despite the accessibility of handguns. The facts of this matter are largely undisputed.

Since it began operation in 1989, CUP Foods has had problems with loitering and drug activity on and near its premises. The City argues that drug dealers and loiterers hang out in and around CUP Foods "with impunity". That is, the City contends that the Licensee has permitted this activity or failed to take reasonable measures to curb this activity and that such failure or inaction on the part of the Licensee amounts to good cause for adverse action to be taken against CUP Foods business licensees. In addition, the City contends that the improvements to the store made by the Licensee have been dilatory, ineffective and far less than requested. For example, the windows of the store remain largely obstructed by signs, only two of 14 deli seats were removed, and the posted "no trespassing" signs are hard to see among all the store's visual clutter. The City contends that these minor improvements have done little to reduce the magnitude of the loitering and drug dealing problems.

The Licensee argues that there is nothing in the record to indicate that the Licensee or any other CUP Foods employees had knowledge that drug transactions were being conducted inside the store. And, the Licensee points out that there is no evidence that the Licensee was present during any of the controlled buys. The Licensee also contends that observation of drug transactions is difficult given the secretive nature of such transactions and the relative ease with which they take place. The Licensee maintains that it is possible that the drug transactions occurred between the aisles or in the back corner of the store where observation is difficult. Moreover, the Licensee asserts that there is nothing in the record to indicate that CUP Foods employees should have had reason to know of drug transactions taking place outside the store. Moreover, as the numerous 911 calls reflect, the Licensee and his employees routinely called the Minneapolis police for assistance in removing unwanted persons and loiterers. According to the Licensee, imposing on CUP Foods and its employees the responsibility to identify drug dealers and spot drug transactions is unreasonable and unfair.

The Licensee also specifically objects to the City's characterization that the sale of narcotics to the undercover police officer in the store's deli was done in plain view of store employees. While the Licensee's brother Billy was working behind the counter, the evidence presented by the undercover officer and the supporting police reports establish that Billy was busy serving customers at the time of the transaction. The Licensee argues that since drug sales are often completed with the slightest of hand movements, it is not unreasonable that Billy did not see the transaction take place. And the Licensee objects to the City's references to the 1993 TAC agreement between the Licensee and the City. The Licensee contends that the City is inappropriately using the circumstances of this agreement as further evidence in support of adverse action against his licenses, when the agreement was not contained in the notice of hearing. According to the Licensee, not only is the TAC Committee proceeding irrelevant to this proceeding because it was already addressed years ago, the City failed to notice the TAC proceeding as an additional reason for adverse action.

Finally, the Licensee points out the actions he has taken to improve his store and to respond to neighborhood residents' complaints. The evidence in the record established that the Licensee did remove some signage from one of his store's windows, he did remove two seats in the deli area, he did remove two public pay

phones that were located outside of the store, he did post “no loitering” or “no trespassing signs”, and he has on occasion hired off-duty police officers to provide security services at the store. The Licensee maintains that the City cannot blame CUP Foods for the drug dealing, loitering, and other criminal activity that is rampant in the 38th Street/Chicago Avenue area. And the Licensee argues that closing CUP Foods will not solve the criminal problems at the 38th Street and Chicago Avenue area – it will only deprive the neighborhood of a convenient grocery store.

The principle issue before the Administrative Law Judge is whether the persistent loitering and sale of drugs on CUP Foods’ premises constitute good cause for adverse action against CUP Foods’ licenses. Before addressing this issue, however, the ALJ will consider the other evidence presented by the City in support of adverse action. In addition to the controlled drug buys, the City listed in its notice of hearing the items seized from the store during the search warrant, the three shootings outside CUP Foods, and the fact that the Licensee’s brother Billy was charged with being a felon in possession of a firearm as evidence that may lead to adverse licensing action. The City did not list the circumstances regarding the 1993 TAC agreement as evidence supporting adverse action. Likewise, the ALJ has not considered the 1993 TAC agreement, or any violation thereof, as grounds for adverse action in this matter. Rather, the TAC agreement is listed in the Findings of Fact for historical context and to demonstrate that the Licensee has been on notice of the loitering and drug peddling problems at his store for some time.

The City contends that the Licensee’s employment of his brother Billy, a convicted felon, is grounds for adverse action. The City points out that during the execution of the search warrant, two loaded handguns were found behind the store counter “within arms reach” of Billy. As a convicted felon, Billy is prohibited from possessing a firearm. The City maintains that allowing a convicted felon to manage the store in close proximity to firearms is grounds for adverse licensing action. The Administrative Law Judge is not persuaded by the City’s argument and finds that the employment of Billy is not grounds for taking adverse action against CUP Foods’ licenses. Not only is it not illegal to employ someone who has a prior felony conviction, there is no evidence in the record that Billy was ever in possession of the store’s firearms. The Licensee testified that he keeps legally purchased handguns in the store for security purposes, as many shopkeepers do. And, although Billy was charged with being a felon in possession of a firearm, this charge was ultimately dismissed by motion of the Hennepin County Attorney. Accordingly, the Administrative Law Judge finds that the evidence regarding Billy’s employment, his proximity to the store’s handguns, and the fact that he was charged with being a felon in possession of a firearm, is irrelevant to this matter.

The Administrative Law Judge also finds that the evidence obtained from the November 1998 search warrant is not, standing alone, sufficient to establish good cause for adverse licensure action. The City established that during the execution of the search warrant, officers seized nine or ten stolen cellular telephones and a stolen bicycle from the basement of the store. The City, however, failed to link the stolen bicycle to the Licensee. The Licensee testified that several bicycles were in the basement of the store when he purchased the building from its previous owner in 1989.

The City was unable to establish when, where, or from whom the bicycle was stolen. With respect to the stolen telephones, the Licensee testified that he rarely purchases used cellular telephones because new ones are so inexpensive. But on those occasions when he does buy a used cellular telephone, the Licensee testified that he calls an 800 service (provided by the cellular phone companies) to verify that the telephone is not stolen before accepting it. The Administrative Law Judge concludes that, while the evidence regarding the nine or ten stolen cellular telephones seized from CUP Foods is relevant to support good cause for adverse action, it is not on its own substantial evidence justifying adverse licensure action.

Finally, the Administrative Law Judge finds that the three shootings that occurred outside of CUP Foods in 1998, cannot be a basis for adverse action against CUP Foods' licenses. The evidence presented established that the shootings were unrelated to CUP Foods and were simply a by-product of the gang violence that is prevalent in this south Minneapolis neighborhood. The intersection of 38th Street and Chicago Avenue South is a high crime area and shootings are unfortunately not uncommon. The City cannot place on CUP Foods the responsibility of preventing gang related shootings outside of the store and evidence of such shootings cannot be used to establish good cause for taking adverse licensure action.

The City may, however, place on the Licensee the responsibility of preventing or curbing drug sales that occur inside the store. The City has amply demonstrated that drug dealing has occurred on a frequent basis on CUP Foods' premises. Specifically, the City established that 10 controlled drug buys occurred on CUP Foods' premises between October 1998 and August 1999. Five of these sales occurred before the search warrant was executed on November 18, 1998, and five occurred after this date. Moreover, eight of the 10 controlled buys occurred inside the store. The City concedes that it does not have evidence that CUP Foods' employees had direct knowledge of the 10 controlled drug buys. The City argues, however, that the fact that the drug dealers can so freely enter CUP Foods and make drug sales is strong circumstantial evidence that CUP Foods employees had constructive knowledge of the sales. And, while the City is unable to establish that the Licensee permitted or encouraged the drug sales and loitering, the City maintains that it has established that the Licensee has failed to put in place adequate measures to control or prevent drug sales and loitering on the store's premises.

Based on the record as a whole, the Administrative Law Judge concludes that the City has demonstrated by a preponderance of the evidence that drug dealing and loitering have occurred on a frequent basis on and near CUP Foods' premises. The ALJ further concludes that the Licensee's failure or inability to prevent or meaningfully control the sale of drugs occurring inside his store constitutes good cause for taking adverse action against CUP Foods' licenses. While the Licensee testified that he routinely asks loiterers to leave, substantial credible testimony from neighborhood residents and police officers established that there is an ongoing pattern of loitering and drug dealing both inside the store and outside the store's front entrance. And, despite some measures taken by the Licensee to increase visibility in his store, the record established that the majority of the store's windows remain obstructed by shelving, advertisements and other signage. (T. at 1003-1004). The inability to see into the

store's windows encourages loitering and criminal activity in general at CUP Foods. (T. at 472-476).

While the measures the Licensee has taken to reduce drug dealing and loitering may be inadequate, they are relevant to the issue of sanctions to be imposed by the City Council. The evidence presented established that the Licensee has called 911 numerous times for police assistance to remove unwanted persons and to report criminal activity. In 1996, for example, 76 calls to 911 were placed from CUP Foods^[19]. In 1997, 75 calls were placed from CUP Foods.^[20] This amounts to approximately 6 calls for police assistance a month. Moreover, testimony from several neighborhood residents and Officer Kenow was very credible regarding the Licensee's practice of ejecting unwanted persons from the store and telling loiterers to leave the premises. In addition, the Licensee has recently hired off-duty police officers to provide security services on the weekend. And the record demonstrated that the Licensee did implement some of the security and crime prevention measures recommended by Civilian Crime Specialist Jan Roesler. Specifically, the Licensee cleared one window of advertising and removed two seats in the store's deli area. In this case, it is ultimately the City Council's decision to determine whether the drug sales and persistent loitering at CUP Foods warrant the denial of CUP Foods' license applications, or whether less severe disciplinary action is more appropriate. Based on the record, the City Council may wish to consider placing conditions on CUP Foods' licenses rather than denying its license applications as the appropriate adverse action in this matter.

P.A.R.

^[1] The lawful hours of operation for CUP Foods are Sunday through Thursday - 6:00 a.m. to 11:00 p.m., Friday and Saturday - 6:00 a.m. to 12:00 a.m.

^[2] The acronym SAFE stands for "Safety for Everyone". SAFE officers are assigned to specific neighborhoods to assist neighborhood groups and businesses with issues related to crime and neighborhood improvement. At the time of this meeting, Officer Appledorn was assigned to neighborhoods near or abutting the 38th Street and Chicago Avenue intersection.

^[3] In 1996, 76 calls to 911 were placed from CUP Foods. In 1997, 75 calls to 911 were placed from CUP Foods. (Exs. 27a, 27b).

^[4] *In re Kaldahl*, 418 N.W.2d 532, 535 (Minn. Ct. App. 1988).

^[5] See, Continuance and Scheduling Order dated December 7, 1999.

^[6] *State v. Moore*, 438 N.W.2d 101, 106 (Minn. 1989). (Example of rare cases include allegations of police perjury in obtaining a search warrant or entrapment.)

^[7] *State v. Rothstein*, 422 N.W.2d 300, 303 (Minn. App. 1988).

^[8] Minn. Stat. § 14.60, subd. 1 (1999).

^[9] Minn. R. 1400.7300, subpt. 1 (2000).

^[10] Licensee's June 28, 2000 Reply Letter at 2.

^[11] Minn. Stat. § 14.58.

^[12] *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); *State v. Duluth M & I R.R.*, 246 Minn. 383, 400, 75 N.W.2d 398, 410, *appeal dismissed*, 352 U.S. 804 (1956); *Glen Paul Court Neighborhood Ass'n v. Paster*, 437 N.W.2d 52, 57-65 (Minn. 1989).

^[13] Minn. Rules 1400.5600, subp. 5.

^[14] *Nolan v. Wisconsin Real Estate Brokers' Bd.*, 89 N.W.2d 317, 322 (Wisc. 1958).

^[15] *Sorbello v. City of Maplewood*, 610 S.W.2d 375, 376 (Mo. Ct App. 1980).

^[16] *Hughes v. Department of Public Safety*, 200 Minn. 16, 21, 273 N.W. 618, 621 (1937); *Schmidt v. Independent School Dist. No. 1*, 349 N.W.2d 563, 567 (Minn. App. 1984).

^[17] Zotos Int'l v. Kennedy, 460 F.Supp. 268, 274 (D.D.C. 1978). *See generally*, Beck, Gossman, Nehl-Trueman, Minnesota Administrative Procedure § 5.2, (2d. ed. 1998).

^[18] *See also*, In the Matter of Thomas Casey, Sr., P.A., 540 N.W.2d 854, 858 (Minn. App. 1995).

^[19] Ex. 27a

^[20] Ex. 27b